

THE ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.15, (Schedule B) to the Energy Competition Act, 1998, S.O. 1998, c.15;

AND IN THE MATTER OF an Application by Toronto Hydro-Electric System Limited Inc. for an Order or Orders granting approval of initiatives and amounts related to the Conservation and Demand Management Code.

Written Argument of The Consumers Council of Canada

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WRITTEN ARGUMENT OF THE CONSUMERS COUNCIL OF CANADA

I Introduction and Overview

1. Toronto Hydro-Electric System Limited ("THESL") applied to the Ontario Energy Board ("Board") for approval of eight (8) Conservation and Demand Management ("CDM") programs, at a total cost of approximately \$50.6 million.
2. These are the submissions of the Consumers Council of Canada ("Council") in that application.
3. This application is the first occasion on which the Board will fully consider an application for approval of a Local Distribution Company's ("LDC") CDM programs. The application of Hydro One Networks Inc. for approval of its CDM programs was withdrawn before the Board could consider it fully.
4. At its most basic level, the Board is only considering whether to approve THESL's CDM programs. However, the application provides the Board with the occasion to set out the principles by which it will consider whether to approve a LDC's CDM programs. In

addition, the application will provide the Board with an opportunity to prescribe guidelines for applications by other LDCs for approval of their CDM programs.

5. A central issue in this application is the relationship among LDCs, the Ontario Power Authority (“OPA”) and the Board with respect to the design and approval of Board-approved CDM programs.

6. An understanding of the issues raised by the application requires a review of the background to the province’s CDM initiatives. Council will begin these submissions with a review of that background.

II Background

7. Directives issued by the Minister of Energy (the “Minister”) to the Ontario Power Authority (“OPA”), and to the Board, set province-wide conservation targets, to be achieved by 2014.

8. The province-wide targets were allocated among LDCs by the Board. The LDC-specific targets were embodied as conditions in the licences of individual LDCs. Those LDC-specific targets were to be achieved by a combination of OPA province-wide programs, and to the extent necessary to accomplish the targets, the LDC-specific programs. The LDC-specific programs require Board approval, and are referred to, hereinafter, as Board-approved programs.

9. The OPA, in consultation with the LDCs, developed a budget to achieve the province-wide targets. That budget is approximately \$1.4 billion and was approved by the OPA board. That total budget was, in turn, allocated to the LDCs, to allow them to achieve their specific targets, in the form of a “program administration budget” (“PAB”). The PAB represents the funds available, from the OPA, for LDCs to achieve their prescribed targets using province-wide programs designed by the OPA.

10. If the LDCs believed that they could not achieve the prescribed targets, using the OPA’s province-wide programs, and with the funding available through the PAB, they could design programs, and propose a budget for those programs, both to be approved by the Board.

11. The Minister issued a Directive to the Board, pursuant to sections 27.1 and 27.2 of the *Ontario Energy Board Act, 1998*. Among other things, the Directive required the Board to issue a code. The code was to include, among other things, rules relating to the approval of Board-approved CDM programs.

12. The Directive required the Board, in developing those rules, to have regard to a number of objectives including that the Board-approved CDM programs not duplicate OPA-contracted province-wide CDM programs which are available from the OPA at the time of Board approval.

13. Finally, the Directive required the Board, in approving Board-approved CDM program to continue to have regard to its statutory objectives, including protecting the interests of consumers with respect to prices.

14. Pursuant to the Minister's Directive, the Board issued its "Conservation and Demand Management Code for Electricity Distributors". That Code include the following provision:

2.3.2 Distributors shall not apply for Board approval of CDM programs that duplicate existing OPA-Contracted Province-Wide CDM Programs

III The Board's Jurisdiction

15. The Board does not have jurisdiction over either the content or the cost of the OPA's province-wide programs. It cannot, in other words, assess whether those programs, or the \$1.4-billion budget for them, are prudent.

16. The Board must approve Board-approved CDM programs. The question is what criteria the Board can, and should, apply in deciding whether to approve those programs.

17. The amounts which the Board approves for Board-approved CDM programs are not recovered from the LDC's ratepayers directly. Rather, they are recovered through the Global Adjustment Mechanism. Because of that, the Board, in deciding whether to approve Board-approved CDM programs, is not determining whether the cost consequences of those programs

are just and reasonable. However, and as noted above, the Board must have regard to the impact of the cost of a LDC's CDM programs on the prices paid by consumers.

18. In deciding whether to approve Board-approved CDM programs, the Board is acting under the authority of the Minister's Directive and, consequently, the CDM Code issued pursuant to that Directive. Since the Directive, and the Code, prescribe that the Board cannot approve a LDC-specific CDM program if it duplicates an OPA province-wide program, that is an essential criterion which the Board must apply in deciding whether to approve a LDC-specific CDM program.

19. The Council acknowledges that duplication is not the only criterion that the Board can use in deciding whether to approve Board-approved CDM programs. However, the other criteria are largely administrative in nature in that they involve a determination of whether the LDC has met the checklist of requirements in the Board's CDM Code. The assessment of duplication requires the exercise of the Board's discretion.

20. The Council submits that duplication necessarily involves an imprudent use of ratepayer funds. It follows that an imprudent use of ratepayer funds has an adverse impact on the prices paid by consumers.

21. The Board's jurisdiction to approve LDC-specific CDM programs is not dependent on any action by the OPA. The OPA itself operates under a Ministerial Directive which requires it to develop CDM programs which meet the prescribed targets. It is the OPA's responsibility to develop the programs. As a practical matter, the OPA has the most knowledge of what the CDM programs consist of and what markets they address, and so forth. As a result, the OPA is in the best position to assess, as a matter of fact, whether Board-approved CDM programs duplicate the OPA's own province-wide programs.

22. The Minister's Directive to the OPA, dated April 23, 2010, requires the OPA to do the following:

1. Play a key role in coordinating and facilitating the successful implementation of the new CDM opportunities provided to LDCs through the *Green Energy and Green Economy Act, 2009*; and

2. Provide advice to the OEB on the administration of LDC CDM activities, including but not limited to the use of OPA cost-effectiveness tests and the OPA protocol process and third-party vendor of record lists in order to assess the cost-effectiveness of Board-Approved CDM Programs and to conduct Evaluation Measurement and Verification of board-approved CDM programs, as requested by the OPA.

23. The Council submits that the requirement that the OPA “play a key role in coordinating and facilitating” successful implementation of the new CDM opportunities and the requirement that it would provide advice to the OEB on the administration of LDC CDM activities necessarily requires the OPA to provide meaningful, timely advice to both LDCs and the Board on, among other things, whether Board-approved CDM programs duplicate OPA province-wide programs.

IV THESL’s Application

24. THESL originally sought approval for nine (9) CDM programs. Two (2) of those programs were consolidated, with the result that THESL now seeks approval for eight (8) CDM programs. The total cost of those programs, over four years, is approximately \$50.6 million. THESL is also seeking approval to recover administrative costs, which it characterizes as “program expenditures”, in the amount of \$343,449.00.

25. The programs for which THESL is now seeking approval are the following:

1. Business Outreach and Education Program;
2. Commercial Energy Management and Load Control Program;
3. Commercial, Institutional and Small Industrial Monitoring & Targeting Program;
4. Community Outreach and Education Initiative;
5. Flat Rate Water Heater Conversion & Demand Response Program;
6. Greening Greater Toronto Commercial Building Energy Initiative;

7. Hydronic System Balancing Program; and
8. Multi-Unit Residential Demand Response Program.

26. The evidence is that THESL was part of a working group, with the OPA and others, developing the OPA's province-wide programs. **(Tr 2, page 28)** THESL was simultaneously developing its own CDM programs. Those programs, which are the subject of this application, were completed by December 2010. **(Tr 2, page 29)**

27. The evidence is that the components of THESL's residential CDM programs were discussed with the OPA as part of the working group that THESL and the OPA participated in through 2010. **(Tr 2, page 132)** The evidence is further that the overlap between the OPA programs and the THESL residential programs would have been apparent as of the end of December, 2010. **(Tr 2, page 132)**

28. The evidence is that, in the months of January and February of 2011, THESL continued to discuss its CDM programs with the OPA. **(Tr 2, page 133)**

29. On March 7, 2011, THESL e-mailed the OPA requesting "a letter of support from OPA stating 'Toronto Hydro's OEB CDM program submissions are non-duplicative of the existing province wide programs' ". The e-mail went on to say that "while we don't believe the letter is an explicit Board Code filing requirement, fundamentally it is the basis of the review and would be very helpful to minimize the number of IRs and expedite the process". **(Exhibit J3.4)**

30. In response to that request, the OPA sent a letter to THESL, dated April 21, 2011. In that letter, the OPA indicated that it had reviewed THESL's evidence related to its then nine (9) proposed CDM programs and stated the following conclusions:

The OPA is of the opinion that programs 1-4 above are payable through the existing Program Administration Budget provided under the Province-Wide Program.

The OPA is of the opinion that the remaining five programs (programs 5-9 listed above) Toronto Hydro are not duplicative, based on the following reasons and the conditions which have been agreed to by Toronto Hydro.

(Exhibit K1.1)

31. In response to that OPA letter, THESL, on the eve of the opening of the oral hearing, produced a chart in which it compared OPA's province-wide residential programs with those being offered by THESL. (**Exhibit K1.2**) The purpose of the chart was to demonstrate that THESL's residential programs were non-duplicative, contrary to what had been asserted in the OPA's letter of April 21, 2011. (**Tr 3, page 100**)

32. At the Board's direction, the OPA had a witness, Julia McNally, appear at the oral hearing. Prior to her testimony, Ms McNally produced a witness statement. (**Exhibit K2.1**) In that witness statement, Ms McNally set out what she described as four components of an analytical framework used by the OPA in assessing whether THESL's CDM programs were duplicative of the OPA's province-wide CDM programs. Those components are:

1. Ensure Incremental MW and GWh and do not undermine Province-Wide programs — e.g. for programs that offer reduced consumption, does the program have the potential to deliver incremental savings beyond those targeted by OPA-Contracted Province-Wide CDM Programs?
2. Avoid Market Place Confusion — e.g. is the program likely to create confusion in the market place?
3. Ensure Prudent Use of Rate Payer Funds by Avoiding Duplication of Resources — e.g. will this program result in duplication of program administration efforts or costs?
4. Capture Regionally Specific Opportunities — e.g. does this program target end uses, behaviours, or customer groups that are specific to the LDCs region? (**Exhibit K2.1, page 2**)

33. Although the purpose of Exhibit K1.2 was to demonstrate that THESL's residential programs are non-duplicative, the information embodied in Exhibit K1.2 was never given to the OPA. (**Tr 2, page 138**)

V Argument

34. The argument is divided into two parts. The first part deals with the role of the OPA, not just in THESL's application but, more broadly, in the application of all LDCs for approval of their CDM programs. The second part deals with THESL's CDM programs.

(a) The Role of the OPA

35. The Council submits that the evidence raises fundamental questions about the appropriate role of the OPA with respect to Board-approved CDM programs.

36. The Council submits that it is part of the OPA's mandate to ensure that Board-approved CDM programs do not duplicate the OPA's province-wide programs.

37. As noted above, the Minister's concern that there be no duplication was evident in terms of the Directive given not just to the Board but to the OPA itself. Given that, the Council submits that it was incumbent on the OPA to take every reasonable measure to ensure that THESL's CDM programs did not duplicate the OPA's province-wide programs, including, on its own initiative, advising the Board of its concerns about duplication.

38. The Council further submits that the OPA is under an obligation to ensure that ratepayer funds are used prudently. The OPA acknowledged that, belatedly, when it responded to THESL's request that it comment on THESL's CDM programs. (**Exhibit K3.4, page 2**)

39. The Council submits that the evidence in this application demonstrates that the OPA has failed to fulfil those two obligations.

40. The evidence is that the OPA was aware of THESL's CDM programs from as early as the end of December, 2010. The Council submits that the Board should conclude from the evidence that the OPA was aware that some of THESL's CDM programs, and in particular, the residential programs, were duplicative of the OPA's province-wide programs. The Council submits that the evidence is clear that, had THESL not asked the OPA for a letter, the OPA would never have advised the Board of its concerns about duplication.

41. The evidence is that the OPA continued to discuss the CDM programs, with THESL, during January and February of 2011. In addition, the OPA was aware that THESL had

applied to the Board for approval of its CDM programs. Indeed, the OPA itself intervened in the THESL application on February 7, 2011.

42. The OPA's intervention letter, which is Exhibit K3.3, indicates that the OPA "writes to communicate its intention to participate as an intervenor in this proceeding". The letter goes on to state the following:

Since its inception, the OPA has played a key role in designing and delivering conservation and demand management (CDM) program. On April 23, 2010, the Minister of Energy and Infrastructure issued a directive to the OPA outlining the requirements for strategic coordination of CDM programs with distributors and the Board. The OPA's interest in this proceeding is with respect to its role in coordinating and facilitating the successful implementation of the new CDM opportunities provided to LDCs through these green energy and green economy, at 2009. (**Exhibit K3.3**)

43. The OPA's witness, Ms. McNally, could not provide a coherent explanation of why the OPA intervened or what the OPA intended to accomplish by intervening. (**Tr 2, pages 1-95**).

44. Notwithstanding that intervention, the OPA delivered no evidence indicating its concern about a possible duplication between its province-wide program and some of THESL's CDM programs. As noted above, it was not until THESL asked the OPA for a letter approving its CDM program that the OPA even put its mind to the criteria by which to assess duplication and wrote a letter setting out its concern about duplication. That it was not until March of 2011, nearly a year after the Minister's Directives, and then in only in response to a request that it write a letter about duplication, that the OPA first put its mind to the criteria for assessing duplication is both astonishing and troubling. It suggests that the OPA was either indifferent to its responsibilities, or careless about how they were fulfilled.

45. The OPA's position is that the determination of duplication is a Board responsibility, as a result of the Board's CDM code, that the OPA has no role to play in assessing LDC applications. (**Tr 3, page 72**) At the same time, however, the OPA acknowledges that it is responsible for ensuring that ratepayer funds are used prudently. (**Exhibit K3.4**) It would seem to the Council to be self evident that, to the extent that LDC programs are duplicative of OPA

programs, ratepayer money is not being used prudently. In those circumstances, it does not matter whether ratepayer money is not being used prudently under an OPA program or a LDC program. It is just not being used prudently. Given that, it would seem to follow that the OPA has a central role to play in assessing LDC applications for approval of Board-approved CDM program.

46. The OPA could have filed evidence on duplication, as a party to the application. Indeed, the Council is puzzled as to why the OPA would otherwise intervene. Offering evidence on duplication is not inconsistent with the Board's role as the ultimate arbiter of whether there is duplication. The OPA knows, better than any other agency in the province, whether there is duplication with its own programs. The OPA can provide an essential evidentiary basis to assist the Board in determining whether, or to what extent, there is duplication.

47. The purpose of these submissions is not to criticize the OPA. However, the OPA's participation in THESL's application highlights the need for a clear and forceful expression of the OPA's obligation to assist the Board, LDCs and stakeholders by providing its assessment of whether Board-approved programs duplicate the OPA's province-wide program. The OPA must not only ensure that there is no duplication between its province-wide programs and LDC-specific programs, but also notify both the individual LDCs and the Board of any duplication as soon as it becomes aware of them.

48. The Council submits that the Board should, in its decision, do the following:

1. indicate that it expects all LDCs seeking approval of CDM programs to obtain, from the OPA, a written assessment as to whether, or to what extent, the LDC's Board-approved CDM programs duplicate OPA programs;
2. indicate that it expects the OPA to provide, in respect of every application by a LDC for approval of Board-approved CDM programs, a written assessment as to whether the LDC's Board-approved CDM programs are duplicative of OPA province-wide programs;

3. indicate that, in the absence of a written assessment from the OPA as to whether a LDC's Board-approved CDM programs are duplicative, an application for approval of those programs will not be considered.

(b) THESL

49. The submissions, in the preceding section, addressed the role of the OPA, both in THESL's application, and more broadly, in applications by LDCs for approval of Board-approved CDM programs. In fairness, it should be observed that THESL was equally responsible for, first, trying to eliminate any duplication between its programs and the OPA's province-wide programs and, having failed to do that, notify the Board of the OPA's concern about duplication.

50. If ratepayer funds are to be used prudently, it is incumbent on both the OPA and individual LDCs to work cooperatively to eliminate duplication between the OPA's province-wide program and individual LDCs Board-approved program.

51. The Council's concern is with THESL's CDM programs that apply to residential consumers, a particular Council's concern is with two programs, the Community Outreach and Education Initiative and the Flat Rate Water Heater Conversion and Demand Response programs.

52. The Community Outreach and Education Initiative is, as the name suggests, a CDM education program. Such programs are permitted under section 4.3 of the Board's CDM Code. THESL proposes to spend \$5.7 million on this program.

53. THESL continues to insist that the OPA has not found that its Community Outreach and Education Initiative is duplicative of OPA province-wide programs (**Argument-in-Chief, pp. 24**). That assertion, while understandable, is inconsistent with the evidence. The Council submits that the OPA's letter of April 21, 2011 is not ambiguous, and that the only reasonable interpretation of that letter is that the OPA finds that THESL's Community Outreach and Education Initiative is duplicative. The Council submits that there is simply no other way to reasonably interpret the OPA's statement that, in its opinion, four (4) of nine (9) THESL's CDM

programs, including the Community Outreach and Education Initiative, “are payable through the existing Program Administration Budget under province-wide program” (**Exhibit K1.1**)

54. THESL’s attempt, as set out in Exhibit K1.2, to distinguish that program from OPA province-wide programs was never put to the OPA. The Council submits that, as a result, the OPA’s expressed concern about duplication remains unchallenged.

55. The Council submits that it was incumbent on both the OPA and THESL to have advised the Board, and the parties, of the issue of duplication as soon as they were aware of that issue. What amounts to THESL’s rebuttal of the OPA’s concern about duplication, delivered on the eve of the opening of the oral hearing was never discussed with the OPA. As a result, the Board is still not aware of the OPA’s final position on whether THESL’s Community Outreach and Education Initiative Program is duplicative of OPA province-wide programs.

56. The Council acknowledges that THESL is obligated, by the terms of its licence, to meet its prescribed CDM targets. However, the obligation that THESL meet those targets does not require the Board to approve any CDM program that THESL proposes simply on the basis that it allows THESL to meet its target. The Board retains the discretion not to approve THESL’s CDM program notwithstanding the terms of THESL’s licence.

57. The onus is on THESL to prove, on a balance of probabilities, that, among other things, its CDM programs are not duplicative of the OPA’s province-wide programs. The Council submits, with respect, that THESL has failed to discharge that onus with respect to its Community Outreach and Education Initiative. If, as the Council suggests, there remains a substantial doubt as to whether that program duplicates OPA’s province-wide program, then, to protect the interest of consumers with respect to prices, the Board should not approve that program. The Council submits that THESL is able to conduct a community education program through the \$14 million available to it, for such purposes, under the OPA’s PAB.

58. With respect to THESL’s flat rate water heater conversion program, the evidence is that THESL proposes to close that program. THESL was asked whether it could unilaterally cease offering the flat rate for water heaters. Its response, in Exhibit J3.1, does not answer the

question. The Council submits that the only reasonable interpretation of that response is that THESL can in fact cease offering the flat rate water heaters program.

59. It is apparent, from the evidence, that THESL, for all intents and purposes, has cancelled the flat rate water heaters program. THESL has been informing its customers with the flat rate water heaters that it would no longer be offering service. Offering incentives to customers to withdraw from a program that is no longer offered is not a CDM program. Accordingly, that program should not be approved by the Board. Seeking approval for funds through the Global Adjustment Mechanism to facilitate the finalization of a LDC-specific program already cancelled is not consistent with the intent of the CDM directives.

60. The Council submits that it is incumbent on THESL to make a proposal, in its next rate application, as to how it proposes to move these customers off the flat rate program. THESL has indicated its intent to do so. (**Exhibit K3.1**) The Council acknowledges that, for some customers, the conversion costs could be significant. The Board should require THESL to develop a process for the conversion that provides customers with sufficient information about the cancellation of the program and the cost implications for those customers. Customers should be informed about how their bills may change, and the options for conversion which could include moving to natural gas.

VI Relief Requested

61. The Council requests the Board deny approval of THESL's Community Outreach and Education Initiative and its Flat Rate Water Heater Conversion & Demand Response programs.

VII Costs

62. The Council asks that it be awarded 100% of its reasonably incurred costs for its participation in this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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